## MOHD KHAIRUL AZAM ABDUL AZIZ v. LEMBAGA PENGAMPUNAN WILAYAH PERSEKUTUAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[CIVIL SUIT NO: WA-21NCVC-23-02-2020]
13 OCTOBER 2020

***CIVIL PROCEDURE:*** *Striking out – Application for – Application to strike out plaintiff's claim – Plaintiff initiated suit as a result of second defendant being given full pardon by Yang di-Pertuan Agong ('YDPA') – Plaintiff sought declaration from court to invalidate full pardon – Whether Pardons Board wrongly constituted and wrongly advised YDPA – Whether plaintiff had locus standi – Whether there were defects in composition of Pardons Board – Whether powers of YDPA in granting pardon justiciable – Whether there were triable issues raised – Whether case could be summarily dismissed under O. 18 r. 19 of Rules of Court 2012 – Federal Constitution, arts. 39, 40 & 42*

This action was initiated by the plaintiff, as a result of the second defendant being given a full pardon by the Yang di-Pertuan Agong ('YDPA'), resulting in commutation of sentence as well as the setting aside of his conviction for an offence under s. 377B of the Penal Code. The second defendant was convicted by the Court of Appeal of the charge and sentenced to an imprisonment term and both the conviction and sentence were upheld by the apex court, whereupon he began serving the jail term until he was pardoned by the YDPA whereby he was immediately released from jail. The plaintiff was taking up this action as a lawyer and a citizen of Malaysia who was aggrieved by the full pardon granted by the YDPA. The main basis of the plaintiff's grievance was that the first defendant, the Pardons Board, apart from being wrongly constituted, had wrongly advised the YDPA. The plaintiff sought a declaration from court to invalidate the full pardon and in the alternative, to limit the pardon to the commutation of sentence but not the revocation of the conviction. Both the defendants applied to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of Court 2012 ('the Rules') on grounds that the claim was frivolous, vexatious and an abuse of the process of the court. The issues that arose were, (i) whether the plaintiff had *locus standi*; (ii) the plaintiff's objection against the composition of the first defendant was due to the absence of the Attorney General ('AG') at the proceedings of the Pardons Board on the day the second defendant's pardon was deliberated upon; (iii) that there were defects in the composition of the first defendant; (iv) were the powers of the YDPA in granting pardon justiciable; (v) whether there was cause of action against the second defendant; and (vi) whether there were triable issues.

**Held (dismissing defendants' applications):**

**(1)** In a criminal case, the prosecution is commenced in the name of the Public Prosecutor ('PP') and not in the name of the victim. The rational of commencing prosecution in the name of the PP is because the prosecutor is representing the public when prosecuting the accused in a criminal case. In sentencing the accused, a vital factor taken into consideration in sentencing is public interest. As the PP represents the public, surely he must be made accountable to the public in carrying out his duties and powers which include the powers to initiate, conduct or withdraw any criminal prosecution as is stated under the Federal Constitution. Similarly, the PP has a very important role in the Pardons Board in advising the YDPA in matters of pardon as is stated in the Federal Constitution. The plaintiff, being a member of the public, has a right to question the PP on the advice given by the first defendant resulting in the full pardon of the second defendant. Further, the plaintiff is not only an ordinary member of the public but also a lawyer and therefore has a higher right than an ordinary public to question the first defendant. (paras 19-22)

**(2)** The first defendant had exhibited a letter from the AG who had delegated his task in the Pardons Board to the Solicitor General II who was present during the proceedings. This letter of the AG represented a legal delegation of power which was authorised under art. 42 cl. 5 of the Federal Constitution. Although the AG might be on leave, he was still the AG and therefore could delegate his presence at the Pardons Board to another officer. (paras 26 & 27)

**(3)** The contention of the plaintiff that the Minister of Federal Territories was not appointed on the date of proceedings of the Pardons Board was of no consequence as the court accepted that under the 'Perintah Menteri-Menteri Kerajaan Persekutuan 2018', the Prime Minister ('PM') was the Minister in charge of the Federal Territory at the material time and the PM was present during the proceedings. Thus, there was no merit in the plaintiff's contention that there was a defect in the composition of the first defendant. (paras 28 & 29)

**(4)** In matters of granting pardon, the Federal Constitution makes it clear that the YDPA must act not only on the advice of the Pardons Board but must also accept the written opinion of the AG. The whole of art. 42 of the Federal Constitution is dedicated to the formation of the Pardons Board and its role. From reading arts. 39, 40 and 42 of the Federal Constitution, in granting pardon, the YDPA is acting in his executive capacity. The granting of pardon is not in the personal discretion of the YDPA. Before considering the granting of pardon, the YDPA must consult and be advised by the Pardons Board and also

consider the written opinion of the AG. The granting of pardon in Malaysia is not a royal prerogative but an exercise of executive power by the YDPA on advice. (paras 37 & 40)

**(5)** On matters of pardon where the YDPA acts on the advice of the Pardons Board and AG, this power was justiciable. The granting of pardon in Malaysia could not be regarded as a royal pardon unlike in countries like England where the pardon by the monarch is not subject to any restrictions and given as a royal prerogative. The granting of pardon could not be ruled as not justiciable just because it was exercised by the august and high office of the YDPA. It would be a dereliction of duty on the part of the court and a breach of the Federal Constitution to rule so. (para 47)

**(6)** The second defendant was not involved in the process of the granting of the pardon but was the beneficiary of the pardon. Technically there was no cause of action against the second defendant. However, the second defendant was correctly named as a party to this suit as this would give him an opportunity to counter the case of the plaintiff during the proceedings and therefore avoid being judged without being heard. (para 49)

**(7)** This suit had raised a number of triable issues, the most important being the validity and correctness of the advice given by the first defendant resulting in the granting of the pardon. This court was empowered to determine whether the advice given justified the pardon and an important reason for doing so was to prevent a breach of art. 8 of the Federal Constitution which stipulates equality before the law. Another important issue was whether the Executive could encroach into the powers of the Judiciary by setting aside a conviction of an accused who had been convicted after the full due process of the law. These were life issues that need to be determined and could not be regarded as merely academic or hypothetical. The second defendant had not completed his full term of imprisonment for which he was sentenced with and therefore the court was still in a position to make the declarations asked for. Thus, this was not a case which could be summarily dismissed under O. 18 r. 19 of the Rules. (paras 50-53 & 57)

**Case(s) referred to:**

*Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC* ***(refd)***

*Karpal Singh v. Sultan Of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC* ***(refd)***

*Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC* ***(refd)***

*Superintendent Of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC* ***(refd)***

**Legislation referred to:**
Federal Constitution, arts. 4, 8, 39, 40(1A), (2), 42(5), (9)
Penal Code, s. 377B
Rules of Court 2012, O. 18 r. 19

*For the plaintiff - Haniff Khaitri, M Reza Hassan & Farhan Kamarudin; M/s Raja Riza & Assocs*
*For the defendants - Natra Idris, SFC & Leela Jeyamani Jesuthasan; M/s Chambers of Leela J*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Akhtar Tahir J:**

**Introduction**

**[1]** Both the defendants have applied to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of Court 2012 ("the Rules"). Order 18 r. 19 of the Rules allows a claim to be summarily struck out for want of cause of action or is frivolous, vexatious and an abuse of the process of court.

**The Background**

**[2]** This action has been initiated by the plaintiff as a result of the second defendant being given a full pardon by the Yang di-Pertuan Agong ("YDPA") on 16 May 2018 resulting in commutation of sentence as well as setting aside of his conviction for an offence under s. 377B of the Penal Code.

**[3]** The second defendant was convicted by the Court of Appeal of the charge on 7 March 2014 and sentenced to an imprisonment term. Both the conviction and sentence were upheld by the apex court on 10 February 2015. Whereupon the second defendant begun serving the jail term until he was pardoned by the YDPA whereby he was immediately released from jail.

**[4]** The plaintiff is taking up this action as a lawyer and a citizen of Malaysia who is aggrieved by the full pardon granted by the YDPA. The main basis of the plaintiff's grievance is that the first defendant apart from being wrongly constituted, had wrongly advised the YDPA.

**[5]** The plaintiff is seeking a declaration from court to invalidate the full pardon or in the alternative to limit the pardon to the commutation of sentence but not the revocation of the conviction.

**[6]** The first defendant's application to strike off the claim under O. 18 r. 19 of the Rules are on the grounds that the first defendant was validly constituted and the proceedings of the first defendant was carried out regularly and in accordance with the law. Further, the granting of the pardon is the sole discretion of the YDPA.

**[7]** The second defendant's application to strike off are on the grounds that the plaintiff has no *locus standi* to bring this suit, the discretion of YDPA is non-justiciable, the court has no power to grant the relief sought for, the issue is hypothetical and academic in nature, there is no cause of action and finally the claim is frivolous, vexatious and an abuse of the process of court.

**The Issues**

**[8]** The *locus standi* of the plaintiff.

**[9]** The composition of the Pardons Board.

**[10]** The powers of the YDPA in granting a pardon.

**[11]** Are the powers of YDPA in granting pardon justiciable?

**[12]** Cause of action against the second defendant.

**[13]** Triable issues.

**[14]** Mode of initiating proceedings.

***Locus Standi***

**[15]** It is the second defendant's contention that the plaintiff has no *locus standi* to bring this action as the pardon does not in any manner affect the plaintiff's personal or legal or any rights or interest. The cases on point are *Karpal Singh v. Sultan Of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64 and the *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12.

**[16]** It is important to note that in *Karpal Singh*'s case (*supra*) the CJ (Malaya) decided that the determination of *locus standi* is at the discretion of the court looking at the facts and surrounding circumstances of each case. The court can take various approaches in determining *locus standi*.

**[17]** In this case, the court has taken the approach that the issue at hand relates to a criminal conviction unlike the case of *Lim Kit Siang (supra)* which relates to a purely civil matter.

**[18]** In a purely civil matter interpretation of *locus standi*, it would be correct to say that the person adversely affected by the pardon granted to the second defendant would be the victim of the offence or his immediate family.

**[19]** However, it must be noted that in a criminal case the circumstances are different. This is reflected by the fact that in a criminal case the prosecution is commenced in the name of the Public Prosecutor and not in the name of the victim. The rational of commencing prosecution in the name of the Public Prosecutor is because as the name of the post suggest the prosecutor is representing the public when prosecuting the accused in a criminal case. This difference is also reflected in sentencing the accused whereby a vital factor taken into consideration in sentencing is public interest.

**[20]** As the Public Prosecutor represents the public surely he must be made accountable to the public in carrying out his duties and powers which include the powers to initiate, conduct or withdraw any criminal prosecution as is stated under the Federal Constitution.

**[21]** Similarly, the Public Prosecutor has a very important role in the Pardons Board in advising the YDPA in matters of pardon as is stated in the Federal Constitution. (In Malaysian context the Attorney General ("AG") and the Public Prosecutor ("PP") are one and the same person).

**[22]** The plaintiff in this case being a member of the public has a right to question the PP on the advice given by the first defendant resulting in the full pardon of the second defendant. Further the plaintiff is not only an ordinary member of the public but also a lawyer and therefore has a higher right than an ordinary public to question the first defendant.

**[23]** In summary, the issue of *locus standi* cannot be looked in the normal narrow scope of a civil matter. This involves a criminal matter and therefore must be looked in a different light.

**[24]** If the fear is that, to loosen the concept of *locus standi* might open the floodgates to countless and unnecessary litigation, there can be restrictions imposed to prevent litigations merely to satisfy the curiosity. The litigant must show valid triable issues.

**The Composition Of The Pardons Board**

**[25]** The first objection of the plaintiff against the composition of the first defendant is the absence of the AG at the proceedings of the Pardons Board on the day the second defendant's pardon was deliberated upon. It is the contention of the plaintiff that according to the media the AG was asked to go on leave by the Prime Minister on 14 May 2018.

**[26]** In reply to this contention the first defendant has exhibited a letter dated 14 May 2018 from the AG who had delegated his task in the Pardons Board to the Solicitor General II who was present during the proceedings.

**[27]** In the court's view this letter of the AG represents a legal delegation of power which is authorised under art. 42 cl. 5 of the Federal Constitution. Although the AG might be on leave he is still the AG and therefore can delegate his presence at the Pardons Board to another officer.

**[28]** The next contention of the plaintiff, that the Minister of Federal Territories was not appointed on the date of proceedings of the Pardons Board is of no consequence as the court accepts that under the "Perintah Menteri-Menteri Kerajaan Persekutuan 2018" [PU(A) 125/2018] the Prime Minister ("PM") was the Minister in charge of the Federal Territory at the material time and the PM was present during the proceedings.

**[29]** In short, in this case the court finds that there is no merit in the plaintiff's contention that there is a defect in the composition of the first defendant on 16 May 2018.

**[30]** However it must be noted that the role of the AG is not only limited to be present during the proceedings of the Pardons Board. An even more important role of the AG is to give a written opinion on the pardon. Article 42 cl. 9 of the Federal Constitution states as follows:

> Before tendering their advice on any matter a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon.

**[31]** The question that arises in this case is whether there was a written opinion given by the AG in this case. Was he allowed to give a written opinion? Can this giving of written opinion be delegated? A host of questions come to mind on this provision of the Federal Constitution which are not addressed in the affidavits filed.

**The Powers Of YDPA In Granting Pardon**

**[32]** The powers of YDPA to grant pardon is contained in art. 42 of the Federal Constitution but for purposes of completeness art. 42 should be read together with two preceding provisions of arts. 39 and 40. It is no coincidence that the articles are arranged in such a manner.

**[33]** Article 39 of the Federal Constitution states that the:

> The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorised by the Cabinet, but Parliament may by law confer executive functions on other persons.

**[34]** Article 40 of the Federal Constitution states as follows:

> (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
>
> (1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.
>
> (2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:
>
> (a) the appointment of a Prime Minister;
>
> (b) the withholding of consent to a request for the dissolution of Parliament;

A (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting, and in any other case mentioned in this Constitution.

(3) Federal law may make provision for requiring the Yang di-Pertuan B Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than:

(a) functions exercisable in his discretion;

(b) functions with respect to the exercise of which provision is made in C any other Article.

**[35]** A careful reading of art. 40 of the Federal Constitution indicates that the YDPA may exercise his executive powers in two ways. The first manner as is provided in art. 40(2) of the Federal Constitution the YDPA can exercise the powers using his own discretion without getting any advice. This D includes on the appointment of the Prime Minister. However, even in the use of his personal discretion the YDPA is bound by convention and unwritten guidelines.

**[36]** On other matters the YDPA must act on advice of persons or body of persons as determined by the law. It is further stated in art. 40(1A) of the E Federal Constitution that when the YDPA acts on advice he is bound to follow the advice.

**[37]** In matters of granting pardon the Federal Constitution makes it clear that the YDPA must act not only on the advice of the Pardons Board but F must also accept the written opinion of the AG. The whole of art. 42 of the Federal Constitution which need not be produced in full here, is dedicated to the formation of the Pardons Board and its role.

**[38]** It can be surmised from reading the three articles of the Federal Constitution ie, arts. 39, 40 and 42 that in granting pardon the YDPA is G acting in his executive capacity. It is also clear that granting of pardon is not in the personal discretion of the YDPA unlike in the situation mentioned in art. 40(2).

**[39]** Before considering the granting of pardon the YDPA must consult and be advised by the Pardons Board and also consider the written opinion of the H AG.

**[40]** That the YDPA in granting pardon is exercising his executive power was recognised in the Supreme Court case of *Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256; [1986] 1 MLJ 494. However in the same case the ruling that the granting of pardon I is a "royal prerogative of mercy" is erroneous. The granting of pardon in Malaysia is not a royal prerogative but and exercise of executive power by the YDPA on advise.

**Is The Power Of The YDPA In Granting Pardon Justiciable?**

**[41]** In a system of Government which practices separation of powers between Legislature, Executive and Judiciary the main rationale for doing so is to prevent abuse of any power by any one arm of the Government and that a system of check and balance can be maintained.

Montesquieu's view

Montesquieu said that if the Executive and the Legislature are the same person or body of persons, there would be a danger of the Legislature enacting oppressive laws which the executive will administer to attain its own ends, for laws to be enforced by the same body that enacts them result in arbitrary rule and makes the judge a legislator rather than an interpreter of law. If one person or body of persons could exercise both the executive and judicial powers in the same matter, there would be arbitrary powers, which would amount to complete tyranny, if the legislative power would be added to the power of that person. The value of the doctrine lies in the fact that it seeks to preserve human liberty by avoiding the concentration of powers in one person or body of persons. The different organs of government should thus be prevented from encroaching on the province of the other organ. [article *Separation of Powers and Administrative Law* by Mayank Shankar May 7 2019].

**[42]** All the powers of the Government whether it is of the Judiciary, the Executive, the Legislature and even the powers of YDPA emanate from the Federal Constitution which is the supreme law of the land. (Article 4 of the Federal Constitution).

**[43]** Another important feature which is clear throughout the reading of the Federal Constitution is that none of the arms of Government are given absolute powers whereby the mechanism of check and balances are put in place. To echo the words from the case of *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] CLJ JT(7):

[28] While none is superior to the other, both the Judiciary and the Legislature are subject to the FC, being the supreme law of the country. In Malaysia, only the FC is supreme (see *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia*, 3rd edn, p. 17). This has an important implication: like all legal powers, judicial power and legislative powers have constitutional limits.

**[44]** As an illustration, the powers of Legislature is checked by having elections every five years, the judicial powers of courts are checked by having an appeal system whereby every decision of a judge is subject to at least two tiers of appeal.

**[45]** The last bastion of checks of the executive powers are the courts and the court system is replete with judicial review cases challenging the powers of the Executive in civil cases and by way of writ of *habeas corpus* in criminal cases.

**[46]** On matters in which the YDPA exercises his executive powers using his own discretion, for example on appointment of the PM, this exercise of powers might not be justiciable.

**[47]** However on matters of pardon where the YDPA acts on the advice of the Pardons Board and AG, this power is justiciable. The granting of pardon in Malaysia cannot be regarded as royal pardon unlike in country like England where the pardon by the monarch is not subject to any restrictions and given as a royal prerogative. The granting of pardon cannot be ruled as not justiciable just because it is exercised by the august and high office of the YDPA. It will be a dereliction of duty on the part of the court and a breach of the Federal Constitution to rule so.

**[48]** In short, this court rules the granting of pardon by the YDPA is definitely justiciable.

**Cause Of Action Against The Second Defendant**

**[49]** In this case the second defendant was not involved in the process of the granting of the pardon but is the beneficiary of the pardon. Technically there is no cause of action against the second defendant . However the court is of the view that the second defendant is correctly named as a party to this suit as this will give him an opportunity to counter the case of the plaintiff during the proceedings and therefore avoid being judged without being heard.

**Triable Issues**

**[50]** This suit has raised a number of triable issues, the most important being the validity and correctness of the advise given by the first defendant resulting in the granting of the pardon.

**[51]** The court is empowered to determine whether the advice given justified the pardon and an important reason for doing so is to prevent a breach of art. 8 of the Federal Constitution which stipulates equality before the law. Another accused facing and being convicted of the same charge must not feel being deprived of a pardon just because he is an ordinary citizen and not a prominent politician like the second defendant.

**[52]** Another important issue is whether the Executive can encroach into the powers of the Judiciary by setting aside a conviction of an accused who has been convicted after the full due process of the law. It must be emphasised this in no way downgrades the august office of the YDPA who has merely acted on advise. In the case of *Letitia* (*supra*) it was stated as follows:

> At the core of the doctrine is the notion that each branch of the Government must be separate and independent from each other. It has been said that for one branch of the Government to usurp the rightful authority and power of another is to undermine the doctrine of separation

of powers (see ***JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia &Anor (Interveners)*** **[2019] 5 CLJ 569**; [2019] 3 MLJ 561 at para. [155] ("*JRI Resources*")). (emphasis added)

**[53]** Finally, to counter the contention of the second defendant that the issue at hand is academic and hypothetical the court views the triable issues as life issues that need to be determined and cannot be regarded as merely academic or hypothetical issues. Further, the second defendant has not completed his full term of imprisonment for which he was sentenced with and therefore the court is still in a position to make the declarations asked for.

**Mode Of Initiating Proceedings**

**[54]** The normal mode of challenging the exercise of executive powers is by way of judicial review. However the courts have ruled in a number of cases that in a case where the performance of public duty affect private rights the actions can be begun by a writ.

**[55]** In this case the court rules that the appropriate mode of initiating this proceeding is by way of writ as it involves determination of issues by way of oral evidence of witnesses who can be subjected to cross-examination.

**Conclusion**

**[56]** The plaintiff has a *locus standi* to file this claim by way of writ to obtain a declaration on the validity of the full pardon granted to the second defendant. There are triable issues which need determination of court after a full trial.

**[57]** This is not a case which can be summarily dismissed under O. 18 r. 19. A full trial with witnesses is necessary for the determination of the issues emanating from this suit. As such the court dismissed the application of both the defendants to strike out the claim under O. 18 r. 19 of the Rules with no order as to costs.

**[56]** As this is a civil matter the plaintiff has to prove his claim on a balance of probabilities. For this purpose the court has set a three-day hearing of this case.